

**DEPARTMENT OF CONSUMER AFFAIRS
CEMETERY AND FUNERAL BUREAU**

FINAL STATEMENT OF REASONS

Hearing Date: December 17, 2002

Subject Matter of Proposed Regulations: Disclosure of Preneed Funeral Arrangements

Sections Affected: Title 16, California Code of Regulations, Division 12, Sections 1258.4, 1277 & 1277.5. Title of Article 8 of Division 12 of Title 16 of California Code of Regulations.

Updated Information: The Initial Statement of Reasons is included in the file. Modified text was made available for comment March 28, 2003 through April 15, 2003. Section 1284.5 was renumbered to Section 1277.5 in the Order of Adoption to relocate the proposed regulation to an appropriate section. This change does not materially alter any requirement, right, responsibility, condition, or prescription and is without regulatory effect pursuant to Title 1, Section 100.

The Cemetery and Funeral Bureau received a Decision of Disapproval of Regulatory Action, File No. 03-1020-01S, from the Office of Administrative Law on December 9, 2003. The Bureau has made the corrections identified by the Office of Administrative Law. Nonsubstantive changes to the language were made to include the "authority" and "reference" citations for Sections 1258.4 and 1277; clarify the title of Article 8; amend the Order of Adoption to accurately indicate additions to and deletions from the California Code of Regulations using underline and strikeout; making typographical corrections. The Bureau has also corrected Form 400 to change the effective date from upon "filing with the Secretary of State" to the "30th day after filing with Secretary of State." These changes do not materially alter any requirement, right, responsibility, condition, or prescription and are without regulatory effect pursuant to Title 1, Section 100.

Local Mandate: The proposed regulations do not impose any mandate on local agencies or school districts.

Business Impact: The proposed regulations will not have a significant adverse impact on business. However, the proposed regulations will affect all funeral establishments.

Underlying Data: Statutes 2001, chapter 715, AB 1277 (Cardenas)

Consideration of Alternatives: No reasonable alternative which was considered or that has otherwise been identified and brought to the attention of the Bureau would be

either more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulation.

Summary of Comments Received and Bureau Response

A summary of comments received regarding this rulemaking file and the Bureau's response to those comments are included in this Final Statement of Reasons. The actual written comments received are included in the rulemaking file under Tab G. A recording of the public hearing is contained in the rulemaking file under TAB F.

The following is a summary of comments received, and the Bureau's response to these comments.

COMMENT: Lupe DeLaCruz, representing the AARP, submitted written comments stating that AARP believes that the proposed language is consistent with the intention of AB 1277 and urges its adoption.

RESPONSE: The Bureau accepts this comment.

COMMENT: Randy Inlow, of The Neptune Society, submitted written comments stating that when the death of a person holding a preneed agreement dies outside of the funeral establishment's service area or out of state, and their survivors make arrangements with another funeral establishment, who is considered the responsible party? If we provide the funeral establishment handling the arrangements a copy of the disclosure and copy of the preneed agreement does this satisfy the requirements of the regulation?

RESPONSE: The Bureau accepts this comment, however nothing in the comment requires a change or modification to the proposed regulation. The survivors making the funeral arrangements are the responsible party. The funeral establishment making the arrangements with the survivors is required to make the disclosure. When a second funeral establishment provides the copy of the preneed arrangements to the funeral establishment where the arrangements are being made, that funeral establishment must then make the disclosure to the consumer.

COMMENT: Robert Edward Green, Attorney at Law, Sonora, California, submitted written comments stating that many members of memorial societies or Funeral Consumer Alliances have on file a preneed plan which is unfounded [sic], and in most cases the family will be aware of the member's plan, but there have been occasions when this was not the case. Mr. Green requests that the words "paid for, in full or in part" be eliminated from the proposed regulations and that any preneed arrangement be disclosed to the party responsible for making the arrangements.

RESPONSE: The Bureau rejects this comment. Expanding the disclosure requirement to include unfunded preneed arrangements would expand the regulation beyond the scope of Business and Professions Code Section 7745.

COMMENT: Ronald White, Whites Funeral Home, Azusa, California, submitted written comments that this legislation will require the disclosure statement be given to every family that does not have a preneed because a contract for their at need selections must be made. The commentator states that the “slip-through” is that the vast majority of preneed contracts do not require at need contracts (unless additional services or merchandise is purchased) – therefore, a contract for funeral good and services will not be drafted. There is no law requiring an at need contract when a preneed contract is being fulfilled.

RESPONSE: The Bureau rejects this comment. Business and Professions Code Section 7685.2 requires a funeral establishment to use a contract with specified information prior to finalizing the arrangements for goods and services. Therefore, a contract is required when at need funeral arrangements are made for a decedent whether or not there is a preneed arrangement.

COMMENT: The Legislative Committee of the Interment Association of California submitted written comments recommending that the language for Section 1277 be changed to read: “Preneed arrangement, “A “preneed agreement” or “preneed” is any written instruction agreement regarding goods or services . . .”and may or may not be unfunded or may be paid for in advance of need.” Commentator states that the reason for wanting to limit this to an “agreement” is that an agreement is by its nature something that has two or more parties to it – presumably the consumer and the funeral provider. A definition that is so broad as to be any written instruction would include so called preneed designations to which the funeral establishment is not a party. The commentator further recommends the form for Disclosure of Preneed Funeral Agreement be similarly modified.

RESPONSE: The Bureau rejects this comment. The proposed change would narrow the scope of the proposed regulation. The authorizing legislation gave specific authority to define preneed arrangements. Narrowing the definition, as the commentator suggests, to include only agreements, which involve the funeral establishment, would limit the definition of arrangements that should be disclosed. Failure to recognize arrangement instructions that are informational only narrows the scope and is unclear as to its intent or result.

COMMENT: Karen Leonard, representing the Redwood Funeral Society, presented oral and written comments stating that the law does not protect consumers unless it demands all pre-arrangements (paid or unpaid) in the possession of a mortuary and/or cemetery be disclosed. Otherwise passing this law is telling consumers the only protection they have is if they prepay, thus causing more harm than good.

RESPONSE: The Bureau rejects this comment. As stated in response to an earlier comment, expanding the disclosure requirement to include unfunded preneed arrangements would expand the regulation beyond the scope of Business and Professions Code Section 7745.

COMMENT: Betty Youngren of Funeral Consumers Alliance of Northern California, presented oral and written comments recommending a better description of what a preneed funeral is. The commentator stated a need to recognize that many people put their funds in trust not to be used in full until the time of their death. The commentator recommends that the definition of "Preneed Arrangements" be revised to acknowledge Totten Trusts and/or Revocable or Irrevocable Trusts. She believes that the regulations ought to have a better description of what paying in advance really means. As long as the funeral director has been notified in writing of the existence of a written arrangement for funding, this should be part of the disclosure form. Funeral Directors should be required to disclose both the arrangements for funding and the arrangements for disposition.

RESPONSE: The Bureau rejects this comment. The proposed definition includes all types of funded preneed arrangements in the funeral establishment's possession and would include disclosure of how the arrangements are to be funded to the extent that the funeral establishment has knowledge of the funding arrangements. There may be arrangements included that are made with a third party to which the funeral establishment would not have knowledge of funding arrangements. By identifying specific funding mechanisms, as suggested by the commentator, the definition would be limited to only those funding mechanisms included in the definition. Any additional or new funding vehicles introduced that are not specified in the definition of the proposed regulation would not be included, thus limiting the scope of preneed arrangements that must be disclosed.

COMMENT: Merrill Mefford, representing Rose Hills Company, submitted oral and written comments recommending that Section 1284.5 be revised to require the funeral establishment to retain either the "original completed disclosure statement, or a copy thereof." The commentator states that requiring the retention of the original document could mean their company would need to keep approximately 35,000 documents over a seven year period, and they do not feel this is reasonable considering many companies now use electronic or computerized storage for documents and these documents have been accepted in court cases. Commentator stated that if the disclosure statement is going to be audited or investigated, the responsible party would be asked to provide a copy to be verified for accuracy or authenticity.

RESPONSE: The Bureau accepts this comment. The proposed language in Section 1284.5 was revised in the Modified Text to provide for the retention of either the original or a copy of the completed disclosure statement.

COMMENT: Jim Draper, California Funeral Directors Association (CFDA) presented oral comments recommending that the reference made in Section 1284.5(a) to the title

of the disclosure form “Disclosure of Preneed Funeral Arrangement”, be changed to “Disclosure of Preneed Funeral Agreement” to be consistent with the title of the proposed form and Sections 7685(b), 7685.6, 7745. The commentator additionally states that, CFDA does not see any problem in the amendment Mr. Mefford has recommended. A copy of the document should be as sufficient as the original for purposes of an audit.

RESPONSE: The Bureau accepts this comment. The reference made in Section 1284.5(a) was revised in the Modified Text as recommended by commentator.

COMMENT: Richard Mielbrecht, Funeral Consumers Alliance, California, Hawaii and San Joaquin County submitted oral comments requesting clarification on Karen Leonard's comments regarding the definitions of “preneed arrangement”, and “Funeral Establishment’s Responsibility” included in the Disclosure of Preneed Funeral Agreement form. On the form, the language for “Preneed arrangement” and the “Funeral Establishment’s Responsibility” is different. The definition of “Preneed Arrangement” includes “may be unfunded, or may be paid for in advance of need”. The “Funeral Establishment’s Responsibility” definition is not consistent with the definition of “Preneed Arrangement”, because it does not include “may be unfunded”. Commentator recommends the definition for the “Funeral Establishment’s Responsibility” be changed to be consistent with “Preneed Arrangement”, requiring the disclosure of unfunded funeral arrangements.

RESPONSE: The Bureau rejects this comment. The differences in wording pointed out by the commentator are appropriate as drafted. Section 1277 defines the terms preneed arrangement, preneed agreement, and preneed, to include both funded and unfunded arrangements. Section 1284.5 and the Disclosure of Preneed Funeral Arrangement form describe the type of preneed arrangements, that the funeral establishment is required to disclose at the time funeral arrangements are made. As stated in response to earlier comments, expanding the disclosure requirement to include unfunded preneed arrangements would expand the regulation beyond the scope of Business and Professions Code Section 7745.

COMMENT: Stan Sandelius, Funeral Consumers Alliance of California & Hawaii, presented oral and written comments. The commentator cited an example of an unfunded preneed arrangement that was not disclosed by the funeral establishment because there was no legal obligation to do so. He stated that there are flaws with the proposed language that must be clarified, and that a preneed arrangement paid for or not should be disclosed to the survivors. He stated that it cannot be said two ways; that it must be clarified. Unless a person makes sure their survivor(s) know about their arrangements, there is no assurance they will have the funeral of their choice. The way it reads now, prepaying is a prerequisite for disclosure.

RESPONSE: The Bureau rejects this comment. As stated in response to earlier comments, expanding the disclosure requirement to include unfunded preneed

arrangements would expand the regulation beyond the scope of Business and Professions Code Section 7745.

SUMMARY AND RESPONSE TO COMMENTS ON THE
MODIFIED TEXT RECEIVED DURING THE COMMENT PERIOD
OF APRIL 1, 2003 THROUGH APRIL 15, 2003

COMMENT: Denise Parker, Deni Enterprises submitted written comments stating the spirit of the legislation was to ensure that survivors receive complete copies of the preneed arrangement, and are informed of the total amount held in the account prior to drafting any at need contract. The modified text does not require the disclosure of the amount of money and interest provided by the preneed arrangement. Also, the commentator questions whether an error occurred in numbering Section 1284.5. The proposed section number would place the section in an unrelated Article of the regulations.

RESPONSE: The Bureau rejects this comment in part and accepts in part. The requirements for Keeping of Preneed Books, Accounts, Contracts, and Records are found in Section 1267 of the California Code of Regulations (CCR), and the Requirements of Preneed Trust Agreements are defined in Section 1275 of the CCR. The enabling statute for the proposed regulations does not address disclosure of financial arrangements, however it does provide for disclosure of any preneed arrangements funded in full or in part to be disclosed. This would include the disclosure of how the arrangements are to be funded to the extent that the funeral establishment has knowledge of the funding arrangements. See response to Betty Youngren's comments on page 3 of this Final Statement of Reasons. The commentators request to add the disclosure of the money and interest held in a preneed account to the disclosure form would expand the regulation beyond the scope of the enabling statute. The Bureau accepts in part the comments regarding the numbering of Section 1284.5. The Bureau has renumbered Section 1284.5 to become Section 1277.5 in the Order of Adoption.

COMMENT: Stan Sandelius submitted written comments forwarding a letter from Eunice Noack, Humbolt Chapter of Funeral Consumers Alliance. Commentator wonders if the proposed regulations should be modified to require disclosures to the survivor and (not "or") the responsible party. There are two reasons for such a requirement: First, if only the survivor receives the disclosure and fails (due to grief) to share it with the responsible party, the responsible party might contract for services without knowledge of an existing preneed arrangement. Second, both disposal of the remains (survivor's domain) and contracting for funeral goods and services (responsible party's domain) are affected by the preneed agreement. It appears that making the change from "or" to "and" might require changes to the Business and Professions Code.

RESPONSE: The Bureau rejects this comment. The requested change would expand the regulation beyond the scope of the statutory authority. The requested change would require legislative changes to the Business and Professions Code.

COMMENT: Betty Youngren submitted written comments stating that wording that varies from location to location is confusing, and cites the wording of Section 1277 that an arrangement may “may be either unfunded or paid for in advance” and the wording in Section 1284.5 and in the disclosure statement that an agreement “paid for in full or in part” must be disclosed. This lack of consistency can and should be worked out to prevent misunderstandings.

RESPONSE: The Bureau rejects this comment. As stated in earlier responses, expanding the disclosure requirement to include unfunded preneed arrangements would expand the regulation beyond the scope of Business and Professions Code Section 7745.

COMMENT: David N. Swim, representing Casket Showrooms, and the California Casket Retail Association, submitted written comments. The commentator states that the modified text does not require the funeral establishment to provide: A) The total sum of funds available in the funded agreement and what funds would be available and refunded if the family selected another service provider. B) The total costs of goods and services agreed to when the preneed plan was drafted compared to the costs of goods and services at the time the goods and services are provided. C) Any difference or overage that will result when the goods and services are required. The commentator further states that the modified text does not state the terms under which the survivor or responsible party is bound by or may be released from the preneed agreement, specifically with regard to: A) Which items are required to fulfill the original agreement. B) Which items may be excluded and refunded. Commentator states that the modified text does not state the terms under which the survivor or responsible party may decide to: A) Receive a full refund of the agreement and select another funeral establishment. B) Select only those items they wish to purchase from the funeral establishment and pay for those items from the preneed agreement, and receive a full refund of the originally paid amount plus interest for items they wish to purchase elsewhere. C) Renegotiate the preneed agreement to more accurately reflect the current terms, conditions, and prices of the funeral market at the time of need.

RESPONSE: The Bureau rejects these comments. See response to comments from Denise Parker on page 5 of this Final Statement of Reasons. Additionally, the requested changes would conflict with Health and Safety Code Section 7100.1 that provides that a written preneed arrangement that is paid in full cannot be materially changed.

COMMENT: Stan Sandelius, Funeral Consumers Alliance of CA & HI submitted written comments. Commentator states the modified text is not consistent throughout. Section 1277 provides that an arrangement may “may be either unfunded or paid for in

advance” and Section 1258.4, leaves out the word “unfunded.” The Disclosure of Preneed Agreement form provided by Section 1284.5 includes the term “unfunded” in the definition of preneed, but omits it from statement of the funeral establishment’s responsibility, so that the funeral establishment is not required to disclose a preneed agreement unless it is paid for in advance. It is apparent the intent is to have disclosure of a preneed agreement to survivors a requirement if it is unfunded or paid for in advance.

RESPONSE: The Bureau rejects this comment. As stated in response to earlier comments, expanding the disclosure requirements to include unfunded preneed arrangements would expand the regulation beyond the scope of Business and Professions Code Section 7745.

COMMENT: Marjorie Bridges submitted written comments. Commentator states that she finds it confusing that in one part the wording indicates all types of preneed arrangements, including wholly funded, partially funded, or unfunded must be disclosed and in the form “unfunded” is left out. Commentator states that it would be simple to add in “unfunded” on the form and other places in the Code where it applies to make it clear that people don’t have to prepay to get their wishes carried out when they die. “Ambiguity may make it harder for you to enforce the rules.”

RESPONSE: The Bureau rejects this comment. As stated in response to earlier comments, expanding the disclosure requirement to include unfunded preneed arrangements would expand the regulation beyond the scope of Business and Professions Code Section 7745.